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Supreme Court, U.S.
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No. 93-159

In the Supreme Court of the United States

OCTOBER TERM, 1993

CHRIS ROWENHORST, PETITIONER

v.

VIOLA MITCHELL AND TRACY BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the allegation that internal revenue officers lied to law enforcement officers, causing petitioner to be falsely arrested and imprisoned, states a cause of action for damages against the revenue officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-12a) is unpublished, but the decision is noted at 981 F.2d 1259 (Table). The order of the district court (Pet. App. 13a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1992. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on May 3, 1993 (Pet. App. la-2a). The petition for a writ of certiorari was filed on July 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This *Bivens* action arises from the following events:

a. On the afternoon of January 23, 1991, Internal Revenue Service officers Viola Mitchell and Tracy Brown met with petitioner at his place of business in Fullerton, California (Pet. App. 4a-5a). At the meeting, Officer Mitchell requested payment from petitioner of an outstanding income tax liability. Petitioner stated that he could not pay the amount due (*id.* at 5a). Officer Mitchell then asked petitioner for permission to enter the premises of his business for the purpose of seizing petitioner's assets. Petitioner refused (*ibid.*).

Officer Mitchell explained to petitioner that, if he refused to allow the officers to seize his assets, the IRS would seek a court order permitting them to enter and seize the property (Pet. App. 5a). According to Mitchell, petitioner became upset and raised his shirt to show the revenue officers that he had a gun in the waistband of his pants (CR 10, Exh. A).[1] Petitioner placed his hand on the gun and asked, "[W]hat do you want me to do, kill?" (Pet. App. 5a). Mitchell understood this as a threat against her (CR 10, Exh. A). Petitioner also threatened to commit suicide (Pet. App. 5a). After further discussion, Mitchell and Brown left petitioner's place of business (*ibid.*).

b. Mitchell promptly reported the incident to IRS Inspector Peter Darvas (Pet. App. 6a). After Darvas consulted with the United States Attorney's office, he and other IRS inspectors and a Fullerton police officer went to petitioner's place of business and arrested him (*ibid.*). The officers found petitioner in possession of a handgun

[1] "CR" references are to the docket control numbers assigned to the documents in the original record on appeal by the clerk of the district court.

(CR 10, Exh. A). Petitioner was charged with assault upon Mitchell and with interference in her performance of official duties (*ibid.*). The criminal complaint against petitioner was dismissed on April 4, 1991, upon motion by the United States (CR 10, at 4-5).

2. On July 15, 1991, petitioner filed a civil action against Mitchell and Brown in their individual capacities, seeking five million dollars in compensatory and punitive damages (Pet. App. 7a; CR 10, at 6). In the complaint, petitioner did not deny that he had been in possession of a handgun or that he had showed it to the revenue officers during the January 23 meeting. Petitioner did, however, deny that he had threatened Mitchell (CR 10, at 4). He charged that Mitchell had made false statements to Inspector Darvas and that petitioner had been arrested and imprisoned in violation of his constitutional rights to due process and to be free from unreasonable searches and seizures (*id.* at 4-5).

The revenue officers asserted the defense of qualified official immunity and moved to dismiss the complaint. The district court dismissed petitioner's complaint, without prejudice, on the ground that it failed to state a claim upon which relief could be granted (Pet. App. 7a). In an amended complaint, petitioner repeated his original allegations and additionally alleged that he possessed a videotape recording of the January 23 meeting that supported his version of the events (CR 10, at 3-4). Petitioner did not state in his amended complaint what, if anything, the videotape showed that supported his allegations.

The district court granted the revenue officers' motion to dismiss the amended complaint. The court ruled that petitioner had failed to allege either a violation of a clearly established constitutional right or a claim sufficient to overcome the qualified immunity of the revenue officers from suit (Pet. App. 4a).

3. The court of appeals affirmed (Pet. App. 3a-12a). The court concluded that petitioner had failed to demonstrate that the revenue officers had violated any clearly established constitutional right (*id.* at 11a). Relying on *Fry* v. *Melaragno*, 939 F.2d 832 (9th Cir. 1991), the court further held that, because Mitchell and Brown were "neither law enforcement officers nor were they involved in the decision to arrest or file criminal charges against [petitioner]," they could not be held liable for any alleged constitutional error in his arrest and imprisonment (Pet. App. 9a-10a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court held that a violation of the Constitution by a federal agent acting under the color of his official authority may give rise to a cause of action for damages against the agent in his individual capacity. A public official, however, is entitled to qualified immunity from suit unless the complaint demonstrates that the officer violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). This Court has emphasized that "in the light of pre-existing law the unlawfulness [of the act] must be apparent." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987).

A plaintiff bringing a *Bivens* action thus bears the burden of showing that the right allegedly violated was clearly established at the time of the incident. *Upton* v. *Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991), cert. denied, 112 S. Ct. 1262 (1992); *Pueblo Neighborhood Health*

Centers, Inc. v. *Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). If the plaintiff's allegations fail to state a claim of violation of a clearly established right, the defendant pleading qualified immunity is entitled to dismissal of the action before the commencement of discovery. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985).

Petitioner's amended complaint failed to meet this requirement and was correctly dismissed by the district court. Petitioner "not only failed to allege the violation of a constitutional right that was clearly established at the time of [respondents'] actions, but he failed to establish the violation of any constitutional right at all." *Siegert* v. *Gilley*, 111 S. Ct. 1789, 1793-1794 (1991). In the amended complaint, as well as at the hearing on the motion to dismiss, petitioner did not cite any authority from which the district court could have found that the revenue officers violated any of petitioner's clearly established constitutional rights.[2] Petitioner made only general references to the Fourth Amendment prohibition against unreasonable searches and seizures and to his right to due process of law. See Pet. App. 10a-11a. As this Court has emphasized, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant,

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[2] At the hearing on the motion to dismiss, petitioner's counsel stated (Pet. App. 11a):

> I can't specifically give you the statute now, but it seems that conduct of this nature in falsely stating to a federal enforcement official that there are grounds for an arrest of an individual should be criminalized or should violate some regulation either of the IRS or some general criminal statute.
>
> . . . .
>
> [T]here must be something in the conduct of these two defendants that violated some sort of right, either constitutional or statutory.

sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. at 640. Because petitioner failed to show that respondents violated any clearly established consititutional right, his amended complaint was correctly dismissed.

b. In *Flood* v. *Harrington*, 532 F.2d 1248 (9th Cir. 1976), a taxpayer brought an action for damages against an IRS official for having "caused" a judicial action for collection of taxes to be brought when that official "knew" the taxpayer owed no tax. The court of appeals held that an IRS official "cannot be held liable for 'causing'" the judicial prosecution of a tax claim. *Id.* at 1251. As the court stated, "[t]he responsibility for that prosecution lay with the United States Attorney General or his delegate" and not with the IRS officer who is responsible for administrative collection of the taxes. *Ibid.*

The court of appeals reached the same conclusion in *Fry* v. *Melaragno*, 939 F.2d 832 (9th Cir. 1991). In that case, the taxpayer alleged that a federal revenue agent had conspired with others to bring false criminal charges against him and had lied to the probation officer preparing the taxpayer's presentence report. Relying on *Flood* v. *Harrington*, *supra*, the court held that the revenue agent was entitled to qualified immunity from suit because the officer did not have authority to "cause" criminal charges to be brought. *Fry* v. *Melaragno*, 939 F.2d at 839. Under the *Fry* and *Flood* decisions, it was thus "clearly established" that revenue officers were *not* liable under the Constitution for damages under the facts alleged in the amended complaint.[3]

[3] There is no merit to petitioner's attempt to distinguish *Fry* v. *Melaragno* on the theory that the "IRS agents in *Fry* did not lie to

2. a. Petitioner errs in contending that decisions from other circuits support his claimed cause of action. The decisions on which petitioner relies (Pet. 12-15) are inapposite. They all involve suits brought under 42 U.S.C. 1983 against police officers acting under state law who allegedly made misrepresentations in affidavits for search warrants.[4] It is well settled that Section 1983 suits may be brought against law enforcement officers. See, *e.g.*, *Branch* v. *Tunnell*, 937 F.2d 1382 (9th Cir. 1991). These cases do not establish that misrepresentations made by federal revenue officers in the circumstances of this case amount to constitutional violations.

b. Petitioner also errs in contending (Pet. 15-18) that the decision in this case conflicts with earlier Ninth Circuit decisions. An intra-circuit conflict of the type petitioner alleges, of course, does not warrant this Court's review. Moreover, the Ninth Circuit cases on which petitioner relies do not conflict with the decision in this case. The decisions in *Johnson* v. *Duffy*, 588 F.2d 740 (1978), and *Smiddy* v. *Varney*, 665 F.2d 261 (1981), cert. denied, 459 U.S. 829 (1982), did not involve *Bivens* claims stemming from an arrest. Instead, they were Section 1983 actions brought against state law enforcement officers. Neither case involved an alleged constitutional violation stemming from misrepresentations by federal employees to law enforcement officers.

c. There is also no merit to petitioner's assertion that the decision in this case is "contrary to the views

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others" and "did not conspire with others to have false criminal charges filed" (Pet. 18). The taxpayer in *Fry* specifically alleged that an IRS revenue agent conspired with others to bring false criminal charges against him and that the agent lied to a probation officer preparing a presentence report. 939 F.2d at 838-839.

[4] The opinion in one of the cases that petitioner cites (*Doe* v. *Louisiana*, 974 F.2d 36 (5th Cir. 1992)) has been withdrawn by the court. See 974 F.2d 38.

expressed by this Court in * * * *Buckley* v. *Fitzsimmons*, [113 S. Ct. 2606 (1993)]" (Pet. 9). *Buckley* held that prosecutors do not have absolute immunity under Section 1983 (i) when conducting investigative work to decide whether a suspect should be arrested or (ii) when making out-of-court statements to the press. 113 S. Ct. at 2616-2618. This Court's holdings in *Buckley* are not relevant to this case because respondents do not claim that they are entitled to absolute immunity.

None of the cases cited by petitioner are relevant to the question presented in this case because none of them put revenue officers "on notice" (*Todd* v. *United States*, 849 F.2d 365, 371 (9th Cir. 1988)) that their allegedly improper conduct violated petitioner's clearly established constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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